

**A Kumarasamy a/l Naciappan v The New Straits Times Press (M)
Bhd**

B HIGH COURT (JOHOR BAHRU) — NO 22NCVC-383 OF 2011
VERNON ONG J
24 APRIL 2012

C *Tort — Defamation — Libel in newspaper — Newspaper article referring to*
statements of political unhappiness — Mistaken photography — Article carried out
photography of wrong person — Person in photography held in contempt and
D *ridiculed by readers of article — Whether impugned words defamatory — Whether*
impugned words defamatory of plaintiff — Natural and ordinary meaning of
impugned words — Whether necessary to show article intended to refer to plaintiff

E The plaintiff, a successful and well known business man in Malaysia, claimed
for damages for defamation arising from a publication of an article in the
defendant's newspaper where his photograph was mistakenly published. On 24
July 2010, the defendant published an article entitled 'Murugiah move riles
some MIC, PPP members' where the article referred to statements made by one
Dr R Muruga Raj who expressed unhappiness with sacked People's Progressive
Party ('PPP') Youth leader Datuk T Murugiah's decision to join the Malaysian
F Indian Congress ('MIC') a political party. The article carried a photograph of
an Indian gentleman purportedly to be that of Dr R Muruga Raj. However, the
Indian gentleman in the photograph was not Dr R Muruga Raj but was in fact
the plaintiff. As a result of this publication, the plaintiff had been held in
contempt and ridiculed by many people who read the article and who actually
G thought that the plaintiff was actually Dr R Muruga Raj. Consequently, the
plaintiff claimed for damages for libel to be assessed. It was not disputed that
the plaintiff's photograph was used by mistake and the defendant admitted to
publishing the article. However, it was argued that the impugned words in the
article did not refer to the plaintiff. The questions of law before the court were
H whether the impugned words were defamatory and if so, were the impugned
words defamatory of the plaintiff.

Held, allowing the claim:

- I** (1) The impugned words carried the natural and ordinary meaning ascribed
to it. The plaintiff testified that after the article was published, he was
shunned wherever he went after he greeted his friends and associates.
Some of them chided him for making the comments so much so that he
had to explain that it was not he who made the comments and that his
picture was wrongly published in the NST. The plaintiff also faced being

stared at by some people whom he has not met before. It was clear that the plaintiff was exposed to hatred, ridicule and contempt; he was also shunned and avoided (see paras 23–24).

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- (2) There was no necessity to show that the defendant intended to refer to the plaintiff. The defendant's intention or state of mind was irrelevant. It was enough if reasonable people would think the words to be defamatory of the plaintiff; it being immaterial that the defendant did not intend to defame the plaintiff. When the photograph which pointed out the plaintiff is supposed by the defendant to point to another man, whom in fact it did not describe, the defendant was equally liable as when the description is supposed to point out nobody. Whether the article was about the plaintiff had nothing to do with the defendant's intent. Given the fact that the plaintiff's photograph was published in the article identifying him to be Dr R Muruga Raj, the court found that in all the circumstances described the impugned words could reasonably be understood to refer to the plaintiff (see paras 29–31).

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- (3) A delayed complaint could contribute to the injury to reputation and would also suggest that the claimant was not injured by the publication. However, the delay in issuing the letter of demand and filing this action was contributed by the defendant's lackadaisical attitude. Both Dr R Muruga Raj and the plaintiff made a complaint to the defendant immediately after the article was published. Having had enough of being subjected to contempt and ridicule, the plaintiff through his solicitors, issued a letter of demand but the defendant's response never came. The defendant only responded after this action was filed saying that they would only be prepared to publish a clarification if the plaintiff agreed to withdraw the present action. It was clear that the defendant did not respond to the initial complaint and failed to take any action to correct the mistake after they came to know about it. Even after receiving the letter of demand, the defendant maintained a wall of silence; responding only after the action was filed (see para 35).

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- (4) The defendant failed or neglected to publish a clarification immediately after the mistake came to its knowledge. No reason was given for the defendant's inaction and indifference. Further, the defendant did not even respond to the plaintiff's letter of demand until after a delay of nine months. Even though the defendant acknowledged its mistake, it still refused to publish a clarification unless the plaintiff withdrew this action. Up to the date of the trial, no clarification or apology has been published. Nominal damages would be inappropriate. The plaintiff was entitled to recover general damages (see para 37).

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[Bahasa Malaysia summary]

Plaintif, seorang ahli perniagaan berjaya dan dikenali di Malaysia, menuntut ganti rugi untuk fitnah yang timbul daripada penerbitan sebuah artikel dalam

- A surat khabar defendan di mana gambarnya telah diterbitkan secara silap. Pada 24 Julai 2010, defendan menerbitkan satu artikel bertajuk 'Murugiah menimbulkan kemarahan beberapa ahli-ahli MIC, PPR' di mana artikel tersebut merujuk kepada pernyataan-pernyataan yang dibuat oleh Dr R Muruga Raj yang menyatakan ketidakpuasan hatinya dengan keputusan pemimpin belia Parti Progresi Rakyat ('PPR') yang dipecat, Datuk T Murugiah, untuk menyertai Malaysian Indian Congress ('MIC') satu parti politik. Artikel tersebut menunjukkan gambar seorang lelaki India yang dikatakan sebagai Dr R Muruga Raj. Walau bagaimanapun, lelaki India di dalam gambar tersebut bukannya Dr R Muruga Raj tetapi sebenarnya adalah plaintif. Akibat daripada penerbitan ini, plaintif telah dihina dan diejek oleh orang ramai yang membaca artikel tersebut dan yang menyangka bahawa plaintif merupakan Dr R Muruga Raj. Sehubungan dengan itu, plaintif menuntut ganti rugi untuk libel dinilai. Tidak dipertikaikan bahawa gambar plaintif telah tersilap digunakan dan defendan mengakui menerbitkan artikel tersebut. Walau bagaimanapun, dihubungkan bahawa perkataan-perkataan yang dipersoalkan di dalam artikel tidak merujuk kepada plaintif. Persoalan undang-undang di hadapan mahkamah adalah sama ada perkataan-perkataan yang dipersoalkan bersifat memfitnah dan sekiranya demikian, adakah perkataan-perkataan yang dipersoalkan memfitnah plaintif.

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Diputuskan, membenarkan tuntutan:

- (1) Perkataan-perkataan yang dipersoalkan membawa maksud semula jadi dan biasa. Plaintif memberi keterangan bahawa selepas artikel tersebut diterbitkan, dia dijauhi di mana sahaja dia pergi selepas dia menegur kawan-kawan dan teman perniagaannya. Sesetengah daripada mereka menegurnya kerana membuat komen-komen tersebut sehinggakan dia terpaksa menerangkan bahawa dia tidak membuat komen-komen tersebut dan bahawa gambarnya diterbitkan secara silap di NST. Plaintif juga berdepan dengan jelingan daripada beberapa orang yang tidak pernah ditemuinya sebelum ini. Adalah jelas bahawa plaintif terdedah kepada kebencian, cemuhan dan penghinaan; dia juga dijauhi dan dielakkan (lihat perenggan 23–24).
- (2) Tiada keperluan untuk menunjukkan bahawa defendan berniat merujuk kepada plaintif. Tujuan defendan atau keadaan fikiran adalah tidak relevan. Adalah mencukupi sekiranya orang munasabah akan memikirkan perkataan-perkataan tersebut memfitnah plaintif; tidak penting bahawa defendan tidak bertujuan untuk memfitnah plaintif. Apabila gambar yang menunjukkan plaintif sepatutnya merujuk kepada lelaki lain oleh defendan, yang pada hakikatnya ia tidak dideskripsikan, defendan adalah sama-sama bertanggungjawab apabila deskripsi tersebut sepatutnya menunjukkan tiada sesiapa. Sama ada artikel tersebut adalah mengenai plaintif tidak bersangkutan dengan tujuan defendan. Fakta menunjukkan bahawa gambar plaintif diterbitkan dalam artikel yang

- menyatakan dia sebagai Dr R Muruga Raj, mahkamah mendapati bahawa dalam semua keadaan menunjukkan perkataan-perkataan dipersoalkan secara munasabah boleh difahami merujuk kepada plaintiff (lihat perenggan 29–31). A
- (3) Aduan lewat boleh menyumbang kepada reputasi tercalar dan juga mencadangkan bahawa penuntut tidak diselar oleh penerbitan tersebut. Walau bagaimanapun, kelewatan mengeluarkan surat tuntutan dan memfailkan tindakan ini disumbangkan oleh sikap acuh tidak acuh defendan. Dr R Muruga Raj dan plaintiff membuat aduan kepada defendan dengan segera selepas artikel tersebut diterbitkan. Selepas puas dicemuh dan dihina, plaintiff menerusi peguam caranya, mengeluarkan surat tuntutan tetapi defendan tidak bertindak balas. Defendan hanya memberi tindak balas selepas tindakan ini difailkan dengan mengatakan bahawa mereka hanya bersedia untuk menerbitkan penjelasan sekiranya plaintiff bersetuju untuk menarik balik tindakan ini. Adalah jelas bahawa defendan tidak memberi tindak balas kepada aduan pertama dan gagal untuk membuat sebarang tindakan untuk memperbetulkan kesilapan selepas mereka mengetahuinya. Walaupun selepas menerima surat tuntutan, defendan tetap mendiamkan diri, mereka bertindak balas hanya selepas tindakan ini difailkan (lihat perenggan 35). B
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- (4) Defendan gagal atau mengabaikan untuk menerbitkan penjelasan dengan segera selepas kesilapan tersebut diketahui. Tiada alasan yang diberikan untuk ketiadaan tindakan dan sikap acuh tak acuh defendan. Seterusnya, defendan tidak memberi tindak balas kepada surat tuntutan plaintiff sehingga selepas kelewatan sembilan bulan. Walaupun defendan mengakui kesilapannya, defendan masih enggan untuk menerbitkan satu penjelasan melainkan plaintiff menarik balik tindakan ini. Sehingga tarikh perbicaraan, tiada penjelasan atau kemaafan diterbitkan. Ganti rugi nominal adalah tidak memadai. Plaintiff berhak untuk mendapat ganti rugi am (lihat perenggan 37).] F
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Notes

For cases on libel on newspaper, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 653–657. H

Cases referred to

- Albert Chew v Hong Leong Finance Bhd* [2001] 4 MLJ 497, HC (refd)
- Al Rajhi Banking & Investment Corporation v Wall Street Journal Europe SPRL* [2003] All ER (D) 148 (Jun), QB (refd) I
- Berkoff v Burchill* [1996] 4 All ER 1008, CA (refd)
- Bloodworth v Gray* (1844) 7 Man & G 334 (refd)
- Bureau v Campbell* (1928) 23 Sask LR 79 (refd)
- Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, HL (distd)

- A** *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577; [2008] 8 CLJ 418, HC (refd)
Chew Sew Khian @ Chew Hua Seng v Saniboev Mohd Ismail & Ors [2003] 5 MLJ 91, HC (refd)
Chong Sew Huat & Anor v Lim Shian Ghee (t/a L & G Consultants & Education Services [2009] 3 MLJ 665, CA (refd)
- B** *Clarke (t/a Elumina Iberia UK) v Bain & Proline Holdings Corp'n* [2008] EWHC 2636, QBD (refd)
Cruise v Express Newspapers plc [1999] QB 931, CA (refd)
Dockrell v Dougall (1899) 80 LT 556 (refd)
- C** *Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd & Ors* [2006] 7 MLJ 561, HC (distd)
Drummond-Jackson v British Medical Association [1970] 1 All ER 1094, CA (refd)
E Hulton & Company v Jones [1910] AC 20, CA (refd)
- D** *Evans v Harlow* (1844) 5 QB 624 (refd)
Garbett v Hazell, Watson & Vinery Ltd [1943] 2 All ER 359, CA (refd)
Goldsmith v Pressdram Ltd [1977] QB 83, QBD (refd)
Gray v Jones (1939) 55 TLR 437, KBD (refd)
Griffiths v Benn (1911) 27 TLR 346, CA (refd)
- E** *Hatchard v Mege* (1887) 18 QBD 771, DC (refd)
Houseman v Coulson [1948] 2 DLR 62 (refd)
Ingram v Lawson (1840) 6 Bing NC 212 (refd)
Jameel v Wall Street Journal Europe SPRL [2006] UKHL 44, HL (refd)
John v MGN Ltd [1997] QB 586, CA (refd)
- F** *Knupffer v London Express Newspaper Limited* [1944] AC 116, HL (refd)
Lewis v Daily Telegraph [1964] AC 234, HL (refd)
Linotype Company Ltd v British Empire type-Setting Machine Co Ltd (1899) 81 LT 331, HL (refd)
Morgan v Odhams Press Limited [1971] 1 WLR 1239, HL (refd)
- G** *O' Brien v Byrant* (1846) 16 M & W 168 (refd)
Palmer v Boyer (1594) Cro Eliz 342 (refd)
Parmiter v Coupland (1840) 6 M & W 105 (refd)
Perunding Alam Bina Sdn Bhd v Errol Oh & Ors [1999] 6 MLJ 101, HC (refd)
Qrummond-Jackson v British Medical Association [1970] 1 WLR 688 (refd)
- H** *Sim v Stretch* [1936] 2 All ER 1237, HL (refd)
Sivabalan all P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320; [2010] 7 CLJ 885, HC (distd)
Soh Chun Seng v CTos-emr Sdn Bhd [2003] 4 MLJ 180; [2004] 5 CLJ 45, HC (refd)
- I** *Solomon v Lawson* (1946) 8 QB 823 (refd)
Stubbs Ltd v Mazure [1920] AC 66, HL (refd)
Stubbs Ltd v Russell [1913] AC 391, HL (refd)
Tabart v Tipper (1808) 1 Camp 350 (refd)
Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (refd)

Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd (1934) 78 Sol Jo 617; 50 TLR 581, CA (refd) A

GK Sriharan (GK Sriharan & Co) for the plaintiff.
Leong Wai Hong (Syafinaz Vani with him) (Skrine) for the defendant.

Vernon Ong J: B

[1] The plaintiff is claiming for damages for defamation arising from a publication of an article in the defendant's newspaper. C

BRIEF ACCOUNT OF THE FACTS

[2] The defendant is the publisher of the 'New Straits Times' ('NST') a national daily newspaper. On 24 July 2010, the defendant published an article in the NST entitled 'Murugiah move riles some MIC, PPP members'. The article referred to statements made by one Dr R Muruga Raj who expressed unhappiness with sacked People's Progressive Party ('PPP') youth leader Datuk T Murugiah's decision to join the Malaysian Indian Congress ('MIC') a political party. D E

[3] This case contains one singular feature. The article in question carried a photograph of an Indian gentleman purportedly to be that of Dr R Muruga Raj. However, the Indian gentleman in the photograph is not Dr R Muruga Raj but is in fact a photograph of the plaintiff Mr Kumarasamy a/l Naciappan. It is not disputed that the plaintiff's photograph was used by mistake. F

The plaintiff's case

[4] The plaintiff is a director and shareholder in two private limited companies; and is a successful and well known business man in Malaysia. The article had wrongfully published the plaintiff's photograph as one Dr R Muruga Raj, as a Johor State Chairman of the PPP and as the person who gave the press statement to NST. The impugned words in the article of which the plaintiff complains are defamatory of him are as follows: G H

Meanwhile, many among Murugiah's multiracial supporters, including those he appointed as state chairman and supreme council members feel a sense of abandonment.

One of his appointees, Johor state chairman Dr. R Muruga Raj, 42, said Murugiah's non-Indian supporters were unhappy with his decision. I

'We feel cheated and hanging without a platform after he decided to abandon us just like that. His Indian supporters may have the choice of joining MIC with Murugiah but what about the non-Indians? He didn't think of us, just of himself and securing his position,' he said.

A Asked if he would follow Murugiah into MIC, Dr. Muruga said: 'No. We are on our own, he is on his own.'

B [5] It is contended that the impugned words in question are defamatory of the plaintiff because in its natural and ordinary meaning, the words are or are understood to mean that:

C (a) the plaintiff is a politician of PPP who is very vocal and with no integrity as he had questioned as to why his leader who was the Youth Chief of the People's Progressive Party ie Datuk T Murugiah that had betrayed the party and joined MIC as a member;

D (b) the plaintiff is a politician who ignored the opinion and the, principle of PPP's top leadership on Datuk T Murugiah's action by issuing his opinion without the prior consent of the Head of the PPP;

(c) the plaintiff is a politician who did not follow the proper channel of PPP's party when making his comments in the said newspaper and is someone who is a trouble maker; and

E (d) the plaintiff had challenged the integrity of Deputy Minister af the Prime Minister's Department who held a portfolio of the Deputy Minister of Public Complaints Bureau.

F [6] As a result of this publication, the plaintiff has been held in contempt and ridicule by many people who read the article and who actually thought that the plaintiff is actually Dr R Muruga Raj. Consequently, the plaintiff is claiming for damages for libel to be assessed.

G *The defendant's defence*

H [7] The defendant admits publishing the article. However, it contends that the impugned words in the article do not refer to the plaintiff. It also contends that the article is not defamatory of the plaintiff and that the article does not carry the meanings as imputed by the plaintiff.

THE LAW OF DEFAMATION

I [8] The law relating to defamation has been comprehensively expounded in a number of cases, notably by Hamid Sultan Abu Backer JC (now J) in *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577; [2008] 8 CLJ 418, by Mohd Zawawi Salleh J in *Sivabalan a/l P Aspathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885, and by Ramly Ali J (now JCA)

in *Soh Chun Seng v CTOS-emr Sdn Bhd* [2003] 4 MLJ 180; [2004] 5 CLJ 45.

What is defamatory?

[9] Malaysian law recognises a person's right to his good name and, subject to various defences protecting the balancing interest of freedom of speech, confers a cause of action on any person of whom defamatory matter is published (Defamation Act 1957). Briefly, defamatory matter means matter which would 'tend to lower the plaintiff in the estimation of right-thinking members of society generally'. The essential nature of a defamatory statement is that it is one that causes an adverse effect on a person's reputation, that is to say, how he is viewed by others. As there is no single definition of what is defamatory, the courts have adopted a number of different phrases. Thus, a statement has been said to be defamatory if it has a tendency to lower, or adversely affect, a person's reputation (*Sim v Stretch* [1936] 2 All ER 1237), or if it exposes a person to 'hatred, contempt or ridicule' (*Parmiter v Coupland* (1840) 6 M & W 105), or causes him to be 'shunned or avoided' (*Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 78 Sol Jo 617; 50 TLR 581), or injures his reputation in the conduct of his trade or business or professional activity (*Qrummond-Jackson v British Medical Association* [1970] 1 WLR 688).

[10] Whether a statement is defamatory is a question of fact. Thus, examples of defamatory imputations abound in previous decisions. They are of value insofar as they illustrate the types of imputation that have over time been held either to be defamatory or to be capable of being defamatory.

Physical characteristics

[11] Statements which comment adversely on a person's physical characteristics may be defamatory; eg statement calling an actor 'hideously ugly' because it would expose him to ridicule (*Berkoff v Burchill* [1996] 4 All ER 1008); statements imputing a person to be impotent (*Cruise v Express Newspapers plc* [1999] QB 931) or has an infectious disease (*Bloodworth v Gray* (1844) 7 Man & G 334).

Moral character

[12] It is defamatory to accuse a person of conduct that would be considered to be immoral by a right thinking person. It may be defamatory to impute of another that he takes or exhibits 'pornographic pictures' (*Garbett v Hazell, Watson & Viney Ltd* [1943] 2 All ER 359, CA), to impute a sexually transmitted disease to another (*Houseman v Coulson* [1948] 2 DLR 62), and to say of someone that he keeps a house of ill-repute (*Bureau v Campbell* (1928) 23 Sask LR 79). Statements imputing criminal conduct, a criminal offence or

A conviction to a person is also capable of being defamatory (*Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44; *Al Rajhi Banking & Investment Corporation v Wall Street Journal Europe SPRL* [2003] All ER (D) 148 (Jun); *Gray v Jones* (1939) 55 TLR 437; *Goldsmith v Pressdram Ltd* [1977] QB 83).

B Imputation as to a person's financial position

[13] Statements impugning a person's financial solvency or integrity, whether or not connected to his trade, business or profession, may be defamatory such as — saying that a person is insolvent or that he cannot pay his debts (*Stubbs Ltd v Russell* [1913] AC 391); that he refuses to pay his debts (*Stubbs Ltd v Mazure* [1920] AC 66); that he is unjustifiably withholding payment (*Clarke (t/a Elumina Iberia UK) v Bain & Proline Holdings Corp'n* [2008] EWHC 2636 (QB)); that he has delayed paying them (*Stubbs Ltd v Mazure*); or bolted without paying his debts (*O'Brien v Byrant* (1846) 16 M & W 168).

Imputations injuring a person in his trade, business, profession or calling

E [14] Any statement which has the tendency to injure a person in his employment, trade, business, profession, office or calling may be defamatory. The right to sue is not limited to natural persons; it also includes companies, partnerships associations and registered societies (*Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB)). Examples include statements imputing a lack of qualification, knowledge, skill, capacity, judgment or efficiency (*Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094); to say of a lawyer that he knows no law (*Palmer v Boyer* (1594) Cro Eliz 342); to impute a doctor that he recommends a method of anaesthetising patients which may be dangerous for them and may impede good dentistry (*Drummond-Jackson v British Medical Association*); to associate a doctor's name with a 'quack' medicine (*Dockrell v Dougall* (1899) 80 LT 556).

Imputations of fraud or dishonesty

H [15] Imputations of fraud or dishonesty made against an office holder, professional man, businessman, company or tradesman may be defamatory. It has been held to be capable of being defamatory to say of a wine merchant that the wine he sold was not good wine provided such statement imports that his judgment in the selection of wine was poor and not merely on this particular batch of wine (*Hatchard v Mege* (1887) 18 QBD 771 (DC); *Evans v Harlow* (1844) 5 QB 624); to say of a manufacturer of machines that they were worthless and unworkable (*Linotype Company Ltd v British Empire type-Setting Machine Co Ltd* (1899) 81 LT 331 (HL); *Griffiths v Benn* (1911) 27 TLR 346 (CA)); or to say of a trader that he sold unwholesome or adulterated goods

(*Solomon v Lawson* [1946] 8 QB 823).

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Imputations against a trader's goods or property

[16] An imputation against a trader's goods or property is not defamatory unless it reflects adversely on the trader's personal or business reputation (*Griffiths v Benn*). Instances include a statement that a bookseller published and had for sale books of an 'absurd, immoral and improper tendency and description for children' was held to be defamatory (*Tabart v Tipper* (1808) 1 Camp 350); a statement that a shipowner had advertised an unseaworthy ship for hire (*Ingram v Lawson* (1840) 6 Bing NC 212).

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FINDINGS OF THE COURT

[17] In this case the fact that the impugned words in the article were published in the NST is not disputed. The fact that the photograph of the plaintiff was mistakenly inserted in the article is also not disputed. The defendant is not relying on the defence of justification, qualified or absolute privilege and or fair comment. The defendant's stand is simply that the article is not defamatory of the plaintiff and that the article does not carry the meanings as imputed by the plaintiff. Accordingly, the only issue for determination relates to whether the impugned words in the article are defamatory of the plaintiff.

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[18] In the particular circumstances of this case, there are two components to this question. In the first place, it is necessary to consider whether the impugned words are defamatory?; If so, it is then necessary to consider whether the impugned words are defamatory of the plaintiff.

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Whether the impugned words are defamatory?

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[19] It is settled law that to be defamatory, an imputation need have no actual effect on a person's reputation. The test revolves around the question of whether the words have the tendency to lower a person's reputation in the estimation of right-thinking members of society generally or whether it has the tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. This is a question of fact.

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[20] In determining this question, the court will consider the ordinary and natural meaning of the words; the meaning that the impugned words 'would convey to ordinary men and women going about their ordinary affairs' (*Lewis v Daily Telegraph* [1964] AC 234). In short, it is the meaning which reasonable and fair-minded people, relying on their common sense, would understand the words to have (*Carter-Ruck on Libel and Privacy*, (6th Ed), LexisNexis at p 86).

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A [21] Sometimes the natural and ordinary meaning of the words used will be readily apparent. However, on other occasions the defamation lies not in the actual words used but in an inferential or implied meaning. As Lord Reid said in *Lewis v Daily Telegraph*, at p 258:

B Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of the natural and ordinary meaning.

C [22] Further, as in this case, where no innuendo was alleged, the natural and ordinary meaning of the impugned words was the meaning, including any inferential meaning conveyed to the mind of the ordinary, reasonable and fair-minded reader (*Charleston & Anor v News Group Newspapers Ltd & Anor* [1995] 2 AC 65 (HL)).

D [23] Therefore, the natural and ordinary meaning of the words may be any literal meaning or any implied or inferential meaning that the words are reasonably capable of bearing without the need to have recourse to extrinsic facts.

E [24] The plaintiff testified that after the article was published, he was shunned wherever he went after he greeted his friends and associates. Some of them chided him for making the comments so much so that he had to explain that it was not he who made the comments and that his picture was wrongly published in the NST. The plaintiff also faced being stared at by some people whom he has not met before. Dr R Muruga Raj ('PW1') testified that to him the impugned words are defamatory in nature because he had been chided by people who did not like his comments. Some people felt that he should not have made such comments and should have left it to the PPP leadership to do so. Mr Seelan a/l Arumugam ('PW3') a PTP driver is an acquaintance of the plaintiff. He testified that he knew the plaintiff by his nickname 'Kumar'. PW3 read the article in the NST and saw the plaintiff's photograph depicting him as Dr R Muruga Raj. After reading the article, he met the plaintiff in front of a Celcom office. He asked the plaintiff 'what is your problem?. ... you troubling for Murugiah ... why you troubling, you make ... why you make trouble?' PW3 said that he was not happy because he knows that Datuk Murugiah is a good Deputy Minister; he is a supporter of Datuk Murugiah. PW3 considered the plaintiff to be a trouble maker. PW3 only relented after the plaintiff clarified the misunderstanding to him.

I [25] In all the circumstances aforesaid, it is clear that the plaintiff was exposed to hatred, ridicule and contempt; he was also shunned and avoided. The court agrees with the submission of learned counsel for the plaintiff that

the impugned words carried the natural and ordinary meaning ascribed to it. Accordingly, the question is answered in the affirmative.

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Whether the impugned words in the article are defamatory of the plaintiff?

[26] Learned counsel for the defendant argued that (i) the fact that the picture of the plaintiff was wrongly inserted does not make the publication defamatory of the plaintiff (*Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd & Ors* [2006] 7 MLJ 561; *Charleston; Sivabalan all P Asapathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885); and (ii) the impugned words do not refer to the plaintiff. It is an established principle that the words must be published of the plaintiff and could have been reasonably be understood to refer to the plaintiff (*Gatley on Libel and Slander*, (11th Ed), 2004 at p 182; *Chong Sew Huat v Lim Shian Ghee (t/a L & G Consultants & Education Services)* [2009] 3 MLJ 665; *Perunding Alam Bina Sdn Bhd v Errol Oh & Ors* [1999] 6 MLJ 101; *Chew Sew Khian @ Chew Hua Seng v Saniboev Mohd Ismail & Ors* [2003] 5 MLJ 91). Learned counsel also submitted that there are two ways of proving identity; namely: (a) by the calling of witnesses to testify that readers of the impugned article would understand the words appearing to refer to the plaintiff; or (b) an ordinary reader reading the article would reasonably understand the words as referring to him (*Morgan v Odhams Press Limited* [1971] 1 WLR 1239).

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[27] On the day the article was published, the plaintiff went to complain about the mistake to Dr R Muruga Raj. They then drove up to the defendant's head office in Kuala Lumpur to lodge a complaint. They made a complaint to an officer and was informed that the plaintiff's photograph was used by mistake; and that the plaintiff's photograph was retrieved from the defendant's archive.

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[28] Ms Suganthi Supamarmanian ('DW1') a journalist with the defendant wrote the article in question. She interviewed Dr R Muruga Raj over the telephone. She has not met Dr R Muruga Raj and she does not know how he looks like. She did not know the plaintiff personally. She is not sure how the plaintiff's photograph came to be used. She said that the editor decided on using the plaintiff's photograph. She knew about the mistake the day after the article was published when one of her colleagues informed her. She informed the editors about the mistake. As they did not get any calls from Dr R Muruga Raj or anyone else or receive any official complaints, they did not take any further action.

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[29] It is settled law that there is no necessity to show that the defendant intended to refer to the plaintiff; in other words, the defendant's intention or state of mind is irrelevant. It is enough if reasonable people would think the

- A words to be defamatory of the plaintiff; it being immaterial that the defendant did not intend to defame the plaintiff (*E Hulton & Company v Jones* [1910] AC 20). Where the plaintiff is not named, the court will consider whether the words would reasonably lead people acquainted with the plaintiff to the conclusion that he was the person referred to (*Knupffer v London Express Newspaper Limited* [1944] AC 116).
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- [30] So, when the photograph which points out the plaintiff is supposed by the defendant to point to another man, whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. Whether the article is about the plaintiff has nothing to do with the defendant's intent. The test is not whom the article intends to name, but who a part of the audience may reasonably think is named — not who is meant but who the article points to.
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- D [31] In this case the words were not published of the plaintiff per se. The plaintiff's photograph was used by mistake in the article. PW3 a person who is acquainted with the plaintiff having read the article understood the impugned words to refer to the plaintiff by reason of the plaintiff's photograph. The court accepts PW3's evidence on this point as plausible. Given the fact that the plaintiff's photograph was published in the article identifying him to be Dr R Muruga Raj, the court finds that in all the circumstances described the impugned words could reasonably be understood to refer to the plaintiff.
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- F [32] The facts in *Dr Bernadine Malini Martin*, are distinguishable from the facts of this case. In that case the plaintiff was a government medical officer; her photograph was published in a female magazine in a write-up about 'A Special Night ... Nothing could be more special than the night of your wedding'. The court held that on the facts the impugned article was not defamatory of the plaintiff. Similarly, in *Charleston*, the plaintiffs were actors in a long-running Australian television serial which was also shown on British television. The defendant's newspaper published material comprising an article with headlines, photographs and captions. The photographs showed the plaintiffs' faces superimposed on the near-naked bodies of models in pornographic poses. The article which made it clear that the photographs had been produced without the knowledge or consent of the plaintiffs, castigated the makers of a pornographic computer game. The House of Lords agreed with the finding of the trial judge that the publication were not capable of being defamatory. In *Sivabalan P Asapathy*, the plaintiff is a practitioner of traditional medicine. The defendant published a news report in the NST entitled 'Healer Held After Girl, 12, Alleges Rape'. That report referred to one 'Nandu Bala' and the plaintiff is known as 'Nandu Bala'. The High Court held that the news report referred to the plaintiff. However, it also held that the fact of a police report being
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lodged on the alleged sexual offence was a matter of public interest which was protected by qualified privilege. The facts in *Sivabalan P Asapathy*, are also distinguishable.

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[33] For the foregoing reasons, the question is also answered in favour of the plaintiff.

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Delay by the plaintiff in filing this action

[34] Learned counsel for the defendant also argued that the plaintiff only issued the letter of demand on 8 February 2011, after a delay of about six months. This action was filed on 18 August 2011, after a delay of one year from the date of the publication of the article. This delay by the plaintiff shows that the plaintiff is actually not defamed by the article (*Defamation Law, Procedure & Practice*, David Price and Koriej Duodo, (3rd Ed), 2004; *Albert Chew v Hong Leong Finance Bhd* [2001] 4 MLJ 497).

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[35] In principle delay in making a complaint can contribute to the injury to reputation and would also suggest that the claimant has not been injured by the publication. Nevertheless, it is important to examine the surrounding circumstances behind the delay. Both Dr R Muruga Raj and the plaintiff made a complaint to the defendant at the defendant's head office in Kuala Lumpur immediately after the article was published. Even after a few months after the publication of the article, the plaintiff was still approached by people who were not pleased with him because of the article. Having had enough of being subjected to contempt and ridicule, the plaintiff decided to instruct his solicitors to issue the letter of demand. Then he waited for the defendant's response never came. However, there was no response from the defendant; the defendant only responded by letter dated 3 November 2011 after this action was filed. The defendant said that they would only be prepared to publish a clarification if the plaintiff was agreeable to withdraw this action. On the evidence, it is clear that the defendant did not respond to the initial complaint by Dr R Muruga Raj and the plaintiff. The defendant also failed to take any action to correct the mistake after they came to know about it. Even after receiving the letter of demand, the defendant maintained a wall of silence; responding only after the action was filed. In all the circumstances aforesaid, the delay in issuing the letter of demand and filing this action was contributed by the defendant's lackadaisical attitude. In the premises, the court is not satisfied that the defendant's argument is well founded.

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DAMAGES

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[36] An action for defamation is essentially intended to vindicate the plaintiff's reputation and to compensate him for any harm done. Damages are

A the primary remedy by which such ends are met. Since a person's reputation has no actual cash value the court will estimate the extent of the harm in the light of all the circumstances.

B [37] The circumstances to be considered include the distress, hurt and humiliation which the article in question has caused and vindicate his reputation (*John v MGN Ltd* [1997] QB 586). In an action for libel actionable per se, such damage is presumed to arise and requires neither a special allegation nor proof. In addition, the court is also entitled to take account of the defendant's conduct, both before and after the libel, whether an apology or retraction was made, the circumstances of the publication and the nature and character of the defamatory words. In this regard, the the defendant failed or neglected to publish a clarification immediately after the mistake came to its knowledge. No reason was given for the defendant's inaction and indifference. Further, the defendant did not even respond to the plaintiff's letter of demand until after a delay of nine months. Even though the defendant acknowledged its mistake, it still refused to publish a clarification unless the plaintiff withdrew this action. Up to the date of the trial, no clarification or apology has been published. It is also pertinent to consider the hurt and ridicule the plaintiff was subjected to during the period after the publication of the article. In all the circumstances aforesaid, nominal damages will be inappropriate. Instead, the plaintiff is entitled to recover general damages as will properly compensate him for the wrong that he has suffered.

CONCLUSION

F [38] For the foregoing reasons, the court grants judgment for the plaintiff on the following terms:

- (a) damages in the sum of RM120,000;
- G (b) interest on RM120,000 at 4%pa from the date of judgment to the date of satisfaction; and
- (c) costs of RM15,000.

H *Claim allowed.*

Reported by Ibnu Aswan

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